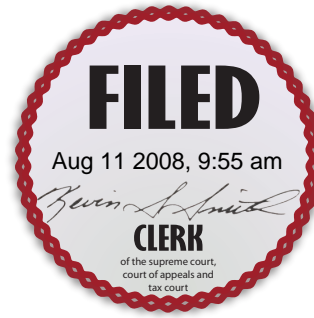


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

JESSE MATTHEWS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0801-CR-64
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Lisa Borges, Judge
Cause No. 49F15-0707-FD-135714

August 11, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Jesse Matthews appeals his convictions for Sexual Battery,¹ a class D felony, Intimidation,² a class D felony, Auto Theft,³ a class D felony, and Battery,⁴ a class A misdemeanor. Specifically, Matthews argues that his convictions for sexual battery and intimidation violate the prohibition against double jeopardy contained in the Indiana Constitution. Finding no error, we affirm.

FACTS

During the early morning of July 10, 2007, twenty-year-old W.H. drove to State Street in Indianapolis to pick up a friend. When she could not locate her friend, W.H. stopped at a convenience store to use its telephone. The store was closed, but Matthews was nearby and offered to let W.H. use his telephone if she would drive him home. W.H. agreed and Matthews entered her vehicle.

Matthews gave W.H. directions as she was driving. W.H. became nervous when “[i]t seemed like it was [taking] . . . too long” because Matthews had told her that he lived “right down the street.” Tr. p. 40. After Matthews instructed W.H. to turn onto a country road, he became verbally aggressive. He “reached over and was rubbing on [W.H.’s] vagina through [her] pants.” Id. at 43. Matthews then pulled W.H. by the back of her head and forced her to kiss him. Matthews told W.H. to “suck his dick or he was going to kill [her].” Id. at 42. Matthews also hit W.H. in the mouth with a closed fist.

¹ Ind. Code § 35-42-4-8.

² Ind. Code § 35-45-2-1.

³ Ind. Code § 35-43-4-2.5.

⁴ I.C. § 35-42-2-1.

W.H. eventually escaped from the vehicle and ran to a nearby house to use a telephone to call the police. Indianapolis Metropolitan Police Department Officer Adam Jones stopped Matthews while he was driving W.H.'s vehicle early the next morning.

On July 16, 2007, the State charged Matthews with class D felony sexual battery, class D felony intimidation, class D felony auto theft, class A misdemeanor battery, and class A misdemeanor unauthorized entry of a motor vehicle. A bench trial was held on November 14, 2007, and the trial court found Matthews guilty of the first four counts but acquitted him of the unauthorized entry of a motor vehicle charge.⁵ A sentencing hearing was held on December 13, 2007, and the trial court sentenced Matthews to various terms for each conviction, for an aggregate sentence of two years of imprisonment. Matthews now appeals.

DISCUSSION AND DECISION

Matthews argues that his convictions for sexual battery and intimidation violate the prohibition against double jeopardy contained in the Indiana Constitution. Specifically, Matthews contends that “[t]he threat used to support the Intimidation conviction—the threat to kill [W.H.] if she did not perform fellatio on him—was the same threat of imminent force the State used to support the Sexual Battery conviction.” Appellant’s Br. p. 5.

Article I, section 14 of the Indiana Constitution provides that “[n]o person shall be put in jeopardy twice for the same offense.” The “actual evidence test” was first

⁵ Matthews does not challenge the auto theft or battery convictions.

enunciated in Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999). Under the actual evidence test, “the Indiana Double Jeopardy Clause is violated when there is a reasonable possibility that the evidentiary facts used to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” Bradley v. State, 867 N.E.2d 1282, 1285 (Ind. 2007). “[T]he ‘proper inquiry’ is not whether there is a reasonable probability that, in convicting the defendant of both charges, the jury used different facts, but whether it is reasonably possible it used the same facts.” Id. (emphases in original). To determine what facts were used, we consider the evidence, charging information, final jury instructions, and arguments of counsel. Goldsberry v. State, 821 N.E.2d 447, 459 (Ind. Ct. App. 2005).

To convict Matthews of class D felony sexual battery, the State was required to prove beyond a reasonable doubt that, with the intent to arouse or satisfy his own sexual desires or the sexual desires of another person, Matthews touched W.H. “when [she was] compelled to submit to the touching by force or the imminent threat of force.” I.C. § 35-42-4-8. To convict Matthews of class D felony intimidation, the State was required to prove beyond a reasonable doubt that by threatening to commit murder, Matthews intended for W.H. to engage in conduct against her will. I.C. § 35-45-2-1.

The State alleged distinct instances of force when it charged Matthews with sexual battery and intimidation. Specifically, the State focused on Matthews’s threat to kill W.H. if she did not perform fellatio to support the intimidation charge and focused on his forced touching to support the sexual battery charge. Appellant’s App. p. 19-20.

The evidence presented at trial showed that Matthews directed W.H. to drive her vehicle onto a country road and then “he started acting mean” and “calling [her] names.” Tr. p. 40. Matthews physically groped W.H. by rubbing her vagina through her pants, pulled her by the back of the head, and forced her to kiss him. Id. at 43. As W.H. continued to drive, Matthews threatened to kill her if she did not perform fellatio on him. Id. at 42, 49.

During closing argument, the State again distinguished the threats of force it was relying on to support each of the charges. Specifically, the State emphasized that it was relying on Matthews’s threat to kill W.H. as support for the intimidation charge and the physical force he exerted while groping her and forcing her to kiss him as support for the sexual battery charge. Id. at 96.

In sum, the charging information, the evidence presented at trial, and the State’s arguments at trial support the conclusion that it is not reasonably possible that the fact finder used the same facts to convict Matthews of intimidation and sexual battery. Thus, Matthews’s convictions for sexual battery and intimidation do not violate Article I, section 14 of the Indiana Constitution.

The judgment of the trial court is affirmed.

MATHIAS, J., and BROWN, J., concur.